UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER. V CERVERA AUTOMOTIVE GROUP, LLC DBA Veracom Ford: ROBERT BRANZUELA, Respondents.	Case No.: 13-73977 NLRB NO.20-CA-095744

RESPONDENTS CERVERA AUTOMOTIVE GROUP, LLC, DBA VERACOM FORD, AND ROBERT BRANZUELA OBJECTIONS TO THE APPELLATE COMMISSIONER'S REPORT AND RECOMMENDATIONS

RESPONDENTS CERVERA AUTOMOTIVE GROUP, LLC DBA VERACOM FORD AND ROBERT BRANZUELA (hereinafter "Respondents"), through their undersigned Counsel, hereby submits their Objections for Respondent to address Report and Recommendation. In

support of this Motion, Respondent, based on information and belief, submit the following:

Respondent wishes to object to the Recommendation Report in two separate time frames. The first part would be from the July 27, 2020 status conference to current. The second part would be from 2014 to 2019.

THE COMMISSIONER'S RECOMMENDATION THAT THE RESPONDENT'S SHOULD BE HELD IN DEFAULT IS CONTRARY TO THE LAW, INCONSISTENT WITH THE FACTS, AND LACKS SUFFICIENT EVIDENCE TO SUPPORT THE SAME

A court weighs five factors before striking a pleading or declaring default: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1990); *see Hester*, 687 F.3d at 1169.

On July 27, 2020, a status conference was held. Counsel for the Board (Petitioner) stated that if Branzuela was not operating a business, there was no purpose to pursuing the present contempt proceeding. However, if Branzuela continued to operate a business the Board would seek to name that business as an alter ego and enforce the 2013 judgment against that business.

A statement was submitted on August 24, 2020 to the Board that Respondent believed substantially complied with the request of the Board. The statement however was not notarized.

On August 31, 2020, the Board filed a status Report which stated it had not been able to obtain a sworn statement from Branzuela "Providing sufficient information for (the Board ") to voluntarily dismiss the instant contempt

proceeding. Further the Board has received no indication that Mr. Branzuela intends to provide such information.

Respondent disagrees with the August 31, 2020 status Report of the Board. Respondent through its efforts and interactions intended to comply with the Recommendations of the July 27, 2020 status conference. Respondent acted in good faith and submitted a statement that addressed many of the issues of concern to the Board.

On October 29, 2020 Respondents submitted a revised signed sworn declaration to the Petitioner. Respondent worked with Petitioner to jointly resolve key points that needed to be addressed before submitting final sworn statement on October 29, 2020.

The Recommendation Report by the Commissioner was based on a status Report by Petitioner that did not reflect the efforts made by Respondents to comply with the July 27, 2020 status conference.

The final sworn statement submitted on October 29, 2020 to Petitioner complies with the requirements set forth by the Board and was sent to the Board for review before final submission.

After numerous communications between Counsels the Board accepted the October 29, 2020 sworn statement.

It was communicated through Counsel that based on the revised sworn statement submitted on October 29, 2020 the Board would not seek to enforce Section III items 1 through 15 on pages 40-44 of the Report and Recommendation (Dkt. Entry 85)

Dkt. Entry 92 page 5 states "the Board respectfully requests that the Court take notice of what has been informed here and issues and order adopting Appellate Commissioner's Report and Recommendation, but that the Court omit

remedies found in paragraphs 1-8, 10-13 and 15 of the Report and Recommendation."

THE APPELLANT'S COMMISSIONER'S RECOMMENDATION THAT THE RESPONDENT'S SHOULD BE HELD IN CONTEMPT OF COURT IS CONTRARY TO THE LAW, INCONSISTENT WITH THE FACTS, AND LACKS SUFFICIENT EVIDENCE TO SUPPORT THE SAME

Civil contempt occurs when a party fails to substantially comply with a specific and definite court order or acts based on an unreasonable understanding of the order. See *Labor/Cmty. Strategy Ctr. v. Los Angeles Cty. Metro. Transp. Auth.*, 564 F.3d 1115, 1123 (9th Cir. 2009); *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006); see also *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804, (2019) (a party may be held in contempt "where there is not a 'fair ground of doubt' as to whether the [party's] conduct might be lawful under the . . . order"). Items 9 and 14 of Report and Recommendation refer to contempt fines for violations of the 2018 contempt adjudication. "Respondent Veracom shall pay total fines of $85,000 and Respondent Branzuela shall pay total fines of $17,000.

Item 17 refers to monetary sanctions in the amount of $5000 to be imposed on Branzuela for his violation of the court order to appear at the July 27, 2020 settlement conference.

Respondents' understanding is that Counsel Patrick Jordan would represent Branzuela at the July 27, 2020 status conference. In addition, Branzuela was concerned that parties other than the Petitioner and Respondent would attend. Representatives from the Union were present at the July 27, 2020 status conference even though Counsel for Respondent was told by the Board that the only parties present would be Petitioner and Respondent.

Nevertheless, Branzuela attempted to attend the conference electronically, he was unable to do so due to technical connectivity difficulty in accessing the conference.

Respondents believe that the fines, penalties are excessive and are not equitable given the circumstances and facts regarding the compliance efforts Respondent adhered to.

Although Respondents expected that the informative motion the Board would file will not seek enforcement and/or monetary fines and penalties of items 1 through 15 of the Commissioners Report, since the informative motion by Petitioner has been filed Respondent hereby submits the following which will address items 9 and 14:

Respondent engaged Counsel in 2014 to represent Veracom for negotiations that took place on March 3, March 11, March 20 and March 26, 2014.

Respondent provided sufficient information to proceed with substantive negotiations.

As a result of the negotiations and all of the voluminous information provided by Respondent, the Union submitted a proposal which included an economic package. During the course of the negotiation's agreement was reached on 11 provisions for a first labor relations contract.

On March 20, 2014 during the course of negotiations the Union agreed the parties were $5.15 per hour apart on wage rate economics.

The Union acknowledged it had received enough information from Respondent that was sufficient enough to generate contract proposals. During these discussions, the Union did not complain about the extent of information provided by Respondent Veracom the Union agreed to make a counter proposal in an effort to bridge the gap between the economic differences during the negotiations.

As of 12/31/ 2019 Respondent has not received any New wage proposal from the Union.

The parties agreed to resume negotiations on May 26, 2014. Prior to May 6, 2014 the Union never contended it was unable to formulate any proposals based on information previously provided by Respondent. The Union did complain they could get employees to participate in meetings to discuss a counter proposal. The Union failed to meet on May 6 2014.

On or around June 16, 2014 the Union submitted a supplemental information request to Respondent. The Union did not submit a counter proposal on economics. The request for information dealt with the status of former employees that were not employed by Respondent in March 2014. The result was the Union refused to bargain.

Their refusal to bargain was due to the Unions acknowledgment that the $5.15 wage gap between the parties would make it unlikely Respondent would accept a proposal due to the economic constraints of the large wage gap difference. The requested information had no relationship to the economic negotiations. Thus, the requested information would not have supplemented or affected the deadlock on the economics of the negotiations. The Unions request for information about former employees was a tactic and strategy used solely for the purpose of delay and not good faith bargaining.

On January 23, 2015 the undersigned reached out to the Union to suggest discussions on breaking the Impasse reached during the March 2014 negotiations. the Union did not respond.

Declaration of Impasse January 23, 2015

Respondents Council declared an impasse on January 23, 2015. Please see Exhibit "A" attached.

Although Respondent understood That Respondent was at an Impasse, Respondent continued to act in good faith to supply information requests and documentation to both the Union and the NLRB from 2015 to 2019.

On July 15 of 2016 Respondent responded to a new information request made by the Union. Respondent confirmed health and welfare records were produced as well as all written company policies regarding wages, hours and working conditions were also submitted on January 22, 2016. Respondent addressed additional issues regarding sick pay and that it had not disciplined any employee represented by the Union since July 1, 2014. Respondent confirmed it has not have any employees with work performance issues in connection with quality of work and/or customer complaints.

On August 18, 2016 Respondent provided additional information to the Union on its policies including sick pay and AB 1513 and the fact that it had no written statement of a pay plan and employees do not utilize a payroll computer system to make entries. The Union did not object to any of the contents of this information or whether it was sufficient as a response to prior requests.

On November 4, 2016 Respondent through Counsel requested the Union supply dates upon which it would be available to bargain.

Respondent also proposed bargaining dates any time from November 14 to 18th, November 28 to December 3 or December 7-11, 2016. The Union did not respond.

On September 14, 2018 Respondent filed its Sworn Statement of Compliance with the Court confirming various documents have been produced to the Union as of September 14, 2018. These documents are as follows:

1. Copies of the Manufacturers labor time guide used in the flat rate compensation plan

2 Technician Efficiency Reports for employees during the time period of January 1, 2013 to September 2018.

3. The computer program used to generate technician efficiency Reports

4. Payroll records for the time period of January 1, 2013 to September 2018.

Respondent further confirmed that It had posted a copy of initial Contempt Adjudication in its service department and lunchroom on September 14, 2018. Lastly, a copy of the sworn statement of compliance was sent to the of the National Labor Relations Board in San Francisco, California

In summary all parties involved have been in an impasse for five years and the Unions attempt to Continually request information which it already has is negotiating in bad faith and never really had and intention to reach a reasonable outcome. The negotiating parties were simply too far apart from an economic standpoint.

The repeated cycle of information requests was merely a stall and delay strategy and tactic. Union representatives had difficulty getting support from the bargaining unit yet persisted. The last sworn Statement of Compliance submitted September 14, 2018. Dkt. Entry 57. Respondent declared on paragraph 2 that "[A]s of September 14, 2018, I have complied with the production of documents to the Union. I have mailed copies of the manufacturer's estimates or labor time guides used in employer's flat rate plan to the Union. I have mailed copies of

technician efficiency reports for unit employees, for the time period of January 1, 2013 to present to the Union. I have sent the computer program used to generate the technician efficiency reports to the Union. And I have provided payroll stubs as well as any weekly or biweekly payroll summaries for the time period of January 1, 2013 to the present. I sent the materials to:

Peninsula Auto Machinist
Local Lodge 1414
150 South Boulevard
San Mateo, California 94022.

The number of documents submitted above to the Union were approximately One Thousand pages for review and examination.

The Union never provided a detailed inventory of documents received by 9/14/2018. Despite the lack of thorough review, the Union made additional Information Requests on August 31, 2018 September 17, and September 21, 2018. All of the additional information requests made were requests of the same information that was already submitted by September 14, 2018.

This repeated cycle of stating to Respondent there is not enough information resulted in an endless cycle of document requests that was over used and excessive.

The Union had sufficient information to make a proposal which they failed to do. A stated lack of information by the Union did not remove the wide Economic gap to reach any meaningful proposal that would be acceptable to Respondent and the Union. Coupled with the fact that an **Impasse was declared on January 23, 2015.**

Respondent acted in good faith far beyond January 23,2015 to comply with the Boards requests. Respondent hereby requests that the Commissioner eliminate

the fines and penalties assessed against Respondent or in the alternative reduce substantially the amounts requested due to the closure of the business and the economic hardship facing Respondents.

Dated this 11th day of December 2020, at Novato, CA.

/s/ Mr. Patrick W. Jordan, Esq

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing was filed electronically with the Court's CM/ECF system this 11th day of December 2020, which will send an electronic notice to all registered parties and Counsel.

/s/ Mr. Patrick W. Jordan, Esq

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"EXHIBIT A"
IMPASSE LETTER
1/23/2015

----- Forwarded Message -----
From: Patrick Jordan <pwj@pjordanlaw.com>
To: Solder1546@sbcglobal.net
Cc: Chris Ohlsen <cjo@pjordanlaw.com>
Sent: Friday, January 23, 2015 2:34 PM
Subject: Veracom Negotiations

Dear Steve it has been quite some time since we last spoke, let alone communicated. In my judgment we have substantially complied with the agreed upon Order. You made comprehensive economic proposals based upon the information at hand and that which we supplied. You are not at all limited in your capacity to formulate proposals, especially most of them are common to the industry in your geographic area.

I don't think the Order requires us to grant you access in the way you describe it. I think we should recognize the reality and that is we are asked impasse. We have urged that bargaining dates be reestablished and that we will entertain any counterproposals you may have. Instead, you seek relief from the Board. You are certainly entitled to seek relief but the company also has some rights and we intend to exercise the.

May be one of the best things we could do is have an off the record discussion to consider options since we have been at a stalemate since March 2014.

Regards, Pat

Patrick W. Jordan, Esq.

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